witnesses if fully examined could have provided that evidence. For example it might have been established there the fire was started at the end of a long dry spell, and that to start a fire with the undergrowth like dry tinder by himself without adequate safeguards was a criminally negligent act. The learned Magistrate was not sure in his own mind, because he wrote in his grounds of decision as follows: — "Since there was no evidence to the effect that the accused on seeing this big fire took any steps to put out the fire the Court found it as a fact that the accused was negligent and he was therefore called upon to answer the charge."

The learned Magistrate probably had the second part of section 285 in mind which reads as follows:—

"..... or knowingly or negligently omits to take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred dollars, or with both."

But with respect to the learned Magistrate, that is not what the accused was charged with. If he found that the evidence did not support the charge as drawn he should as he is in duty bound to do under section 173(h) of the Criminal Procedure Code have amended it so that the accused stood charged with knowingly omitting to take such order with a fire as is sufficient to guard against any probable danger to human life. In which case, in view of the evidence of Arshad bin Hj. Asha'ari there would have been a case for the accused to answer.

The appeal must be allowed, the conviction quashed and the fine refunded.

Appeal allowed.

Solicitors: *Pillai & Co.*

WONG NYET WAH v. PUBLIC PROSECUTOR

[A. Cr. J. (Ong J.) July 13, 1962]

[K.L. — Criminal Appeal No. 24 of 1962]

Criminal Law and Procedure — Extortion — Penal Code, s.384 — Alleged extortion by three — Two visits to complainant — First accused present at both but conversation carried out by second accused — Money received by second accused — Whether first accused guilty by reason of his presence at both meetings — Whether further evidence of complicity necessary.

The three accused saw the complainant on October 22, 1961, and the second accused, who was the only one of the three who spoke, asked complainant to join his gang for self-protection. The entrance fee was stated as $7.20 and the monthly subscription $2 per head. On November 1, 1961 the three accused returned to collect the money in accordance with the arrangements with the complainant. The demand for the money was again made by the second accused. All the three accused were arrested immediately thereafter and charged. The first and second accused were convicted in the Sessions Court. The learned President based his conviction of the first accused on the fact of his presence during both visits. The first accused appealed.

Held: the mere fact of presence could be equally consistent with innocence as with guilt. To sustain a conviction it was necessary to show at the minimum that when the demand for money was made at the first visit, the first accused heard it made and knew of it. As there was no such finding of fact in the evidence, the appeal must be allowed.

Cases referred to:—

(1) *Gray* 12 Cr. App. R. 244, 246.

(2) *Wilcox* v. *Jeffery* [1951] 1 All E.R. 464, 466.

(3) *R.* v. *Coney* (1881-82), 8 Q.B.D. 534, 540.

CRIMINAL APPEAL.

Y. S. Lee for the appellant.

Mohd. Isa bin Ibrahim (Deputy Public Prosecutor) for the respondent.

Ong J.: The appellant was tried in the Sessions Court at Kajang with two other accused persons upon a charge that they, on November 1, 1961 at a kongsi-house near the Sungei Chua Bridge, Kajang, committed extortion by putting one Low Lang in fear of injury to himself if the sum of $7.20 was not paid to them, an offence punishable under section 384 of the Penal Code. The third accused was acquitted at the close of the prosecution; the appellant (who was the first accused) and the second accused were called upon to enter their defence. The appellant elected to give evidence and did so. The second accused elected to say nothing in his own defence. Both were convicted and sentenced to three years' imprisonment. The second accused has not appealed, but the appellant appeals against both the conviction and sentence.

The relevant facts are as follows: The complainant, Low Lang, was the headman of a bridge construction gang of labourers, 7 male and 2 female, engaged in building a wooden bridge over the Sungei Chua, at the southern outskirts of Kajang, and they lived in a plank hut erected alongside the bridge. While Low was in the company of two others, Yew Ping Ying (P.W.2) and Chong Lum Ying (P.W.3), at about 8 p.m. on October 22, three visitors came to the hut. In a conversation which took place exclusively between Low and the second accused, Low was asked by that accused to join his gang for self-protection. The entrance fee was $7.20 and the monthly subscription $2 per head. Low said he had then only $5 and the second accused agreed to call for payment on November 1. Low's employer came to see his labourers on October 27 and the matter was reported to him. He took Low to the Kajang Police Station where Low made his report, No. 1393/61, to the O.C.P.D. On the night of October 31, the O.C.P.D. instructed a detective police constable and a police constable to set a trap, and supplied them $7 in marked notes. They went to the hut at about 4 a.m. and arranged with Low to remain hidden in the sleeping quarters in the loft, after handing him the $7 for payment. To this sum Low added $44 of his own, making a total of $51. While the labourers were resting after their

mid-day meal on November 1, the second accused arrived on the scene in the company of the appellant. The second accused demanded payment from Low who said, "You better come into my room and get the money." Low then led the way into a room on the ground, and he stated that both the second accused and the appellant followed him. Inside the room he handed the $51 to the second accused, and then made an excuse to go out. In response to his signal the two police constables descended from their hiding place and arrested the two persons stated to be still inside the room. The money was found still in the hands of the second accused.

While there could have been no doubt about the guilt of the second accused, it is equally clear that the mere presence of the appellant on the scene is not *ipso facto* conclusive proof of his participation in the offence. The crucial point which had to be considered was whether, on the occasion of the earlier meeting on October 22, the demand by the second accused was made, not only while the appellant was in the immediate vicinity of the parties to the conversation, but also that it was within the hearing of the appellant, so that the demand was actually known or must have been known by him. Unless it was proved that the appellant had such knowledge he cannot by mere inference be held to have had any guilty knowledge of the purpose of the second accused's subsequent visit to collect the money.

The law is quite clear. In the case of *Gray* [1] Lord Reading C.J. said:

> "It is not necessary that a man, to be guilty of murder, should actually have taken part in a physical act in connection with the crime. If he has participated in the crime — that is to say, if he is a confederate — he is guilty, although he has no hand in striking the fatal blow. Equally it must be borne in mind that the mere fact of standing by when the act is committed is not sufficient. A man, to become amenable to the law, must take such a part in the commission of the crime as must be the result of a concerted design to commit the offence."

In *Wilcox* v. *Jeffery* [2] Lord Goddard cited and followed a *dictum* of Cave J. in *R.* v. *Coney* [3] as follows:

> "Where presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is *prima facie* not accidental it is evidence, but no more than evidence, for the jury."

In the present case the learned President's grounds for convicting the appellant are set out in these words:

> "During the first visit of the accused persons to the kongsi when P.W.1 was asked to join their gang and pay money, it was accused No. 2 who spoke, and accused No. 1 was merely present but did not himself speak to P.W.1 to ask him to join the gang or to pay money. But the fact that accused No. 1 appeared again at the kongsi together with accused No. 2 on 1.11.61 and accused No. 1's conduct during this visit clearly showed that he was taking part in the demand for money."

An inference of the appellant's complicity thus appears to have been drawn from his mere presence on the two occasions and certain words he was alleged to have uttered on November 1. In the absence of any finding of fact in the judgment that the appellant heard the demand made and knew of it, on the occasion of the first visit, his presence then and on the subsequent occasion might have been quite accidental and therefore equally consistent with his innocence as with his guilt. It then falls for the Court to consider whether the appellant's conduct on the latter occasion was such as to show that he was taking part in the demand. This in fact consisted only of a cryptic remark alleged by Low to have been made by the appellant after the $51 was handed to the second accused: "Give the name, not the correct one, but the fictitious one." In a small hut where other remarks exchanged were said to have been heard by both the police witnesses hidden in the loft, one would have expected that they would be able to corroborate the only bit of evidence tending to show the appellant's complicity in the offence. Neither of them did so. On the contrary, their evidence of conversation in the Malay language between the second accused and Low must be regarded as materially conflicting with Low's own evidence. He never mentioned any use of Malay. After careful consideration of the whole of the evidence, I am bound to say that I entertain very grave doubts about the guilt of the appellant. I therefore allow the appeal and set aside the conviction and sentence.

Appeal allowed.

HO NYUK CHIN & ANOR. v. LEONG CHEN SEONG & ORS.

[O.C.J. (Azmi J.) July 14, 1962]

[Ipoh — Originating Summons No. 182 of 1961]

Will — Construction — "Permit to occupy" premises free of rent — Subletting of premises — Whether permittee entitled to rents collected or whether rents form part of estate — Whether permittee has use of premises with right to rent out or whether permission is a licence.

The 1st defendant and two others were executors and trustees of the will of one M.L.K. who by clause 8(6) of his will provided: "Until the time fixed for the distribution of my estate I direct my trustees to carry out the following directions: (6) To permit the said Leong Chen Seong and the said Yoon Chin Phin as well as my wife, Ng Soon Hin to occupy Premises No. 11, Brewster Road, Ipoh, free of payment of any rent and also to pay them for the maintenance and upkeep of their family residing at the said premises monthly the sum of $500 which shall include the payment of school expenses and the employment of servants." At some time or other one or all of the defendants sub-let the front ground portion of the said premises at a rental of $100 per month.

This application sought to determine whether (i) Leong Chen Seong, Ng Soon Hin and Yoon Chin Phin, three of the defendants should be entitled to the rents collected or that the same should form part of the estate; (ii) under clause 8(6) of the said will the defendants could use the house with the right to rent out part of it and retain the rest for themselves, or whether they were licensees.

Held: (1) having regard to the words used, i.e. "permit to occupy" and that they were to occupy for only two years, all that was given to the dependants was a mere licence to live in the house;